

NORMAN E. GARNER,
Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social
Security,

Defendant

)
) No. CV-12-0110-CI
)
) ORDER DENYING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
)
)
)
)
)
)

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 11, 19. Attorney David L. Lybbert represents Norman E. Garner (Plaintiff); Special Assistant United States Attorney David J. Burdett represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 3. After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for Defendant.

Plaintiff protectively filed for disability insurance benefits (DIB) on October 17, 2007, alleging disability due to sensitivity to chemicals and asthma since June 30, 2005. Tr. 15, 233. His claim was denied initially and on reconsideration. Plaintiff requested a hearing before an administrative law judge (ALJ), which was held on

1 May 20, 2010, before ALJ Michael S. Hertzog. Plaintiff, who was
2 represented by counsel, and vocational expert Tom Meunier testified
3 at the hearing. Tr. 15, 29-52, 150. A supplemental hearing was
4 held on July 26, 2010, at which Plaintiff and medical expert Ashok
5 Khushalani, M.D. testified. Tr. 53-69, 203. The ALJ denied
6 benefits on July 30, 2010. Tr. 15-23. The Appeals Council denied
7 Plaintiff's request for review of the ALJ's denial on January 26,
8 2010. Tr. 1-3. The instant matter is before this court pursuant to
9 42 U.S.C. § 405(g).

10 STANDARD OF REVIEW

11 It is the role of the trier of fact, not this court, to resolve
12 conflicts in evidence. *Richardson v. Perales*, 402 U.S. 389, 400
13 (1971). If evidence supports more than one rational interpretation,
14 the court may not substitute its judgment for that of the
15 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999);
16 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless,
17 a decision supported by substantial evidence will be set aside if
18 the proper legal standards were not applied in weighing the evidence
19 and making the decision. *Browner v. Secretary of Health and Human*
20 *Services*, 839 F.2d 432, 433 (9th Cir. 1988). If there is substantial
21 evidence to support the administrative findings, or if there is
22 conflicting evidence that will support a finding of either
23 disability or non-disability, the finding of the Commissioner is
24 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
25 1987). "This is a highly deferential standard of review."
26 *Valentine v. Commissioner of Social Sec. Admin.*, 574 F.3d 685, 690
27 (9th Cir. 2009).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). This burden is met once a claimant establishes that a physical or mental impairment prevents him from engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a), 416.920(a). At step five, the burden shifts to the Commissioner to show that (1) the claimant can perform other substantial gainful activity; and (2) a "significant number of jobs exist in the national economy" which claimant can perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

STATEMENT OF THE CASE

The facts of the case are set forth in detail in the transcript of proceedings and briefly summarized here. Plaintiff was 60 at the time of the hearing. Tr. 41. He has a high school education and past work history of 34 years as an inspector/process observer in the manufacture of metal products for nuclear reactors. Tr. 34, 234; ECF No. 12 at 4. Plaintiff testified he developed a sensitivity to chemicals at his workplace that has made it impossible for him to be in outside environments for any length of time. He reported he reacts to most everyday chemicals and odors with severe headaches, nausea, dizziness and instability. He testified he only feels well

1 in his home environment, which is free of offending irritants. He
2 stated he is unable to be out of his house or around people long
3 enough to find work. Tr. 35, 42-44, 249, 285.

4 **ADMINISTRATIVE DECISION**

5 The ALJ found Plaintiff met requirements for DIB through
6 December 2010. Tr. 17. At step one, the ALJ found Plaintiff had
7 not engaged in substantial gainful activity since the alleged onset
8 date. He found Plaintiff had severe impairments of bronchial asthma
9 and sensitivity to chemicals. *Id.* Plantar fasciitis was identified
10 as a non-severe impairment. Tr. 18 At step three, he found
11 Plaintiff's impairments, alone and in combination, did not meet or
12 medically equal one of the listed impairments in 20 C.F.R., Appendix
13 1, Subpart P, Regulations No. 4 (Listings). *Id.* At step four he
14 determined Plaintiff had no exertional limitations but "must avoid
15 concentrated exposure to fumes, odors, gases, and poor ventilation."
16 *Id.* Based on this RFC, the ALJ concluded Plaintiff could not
17 perform his past relevant work. Tr. 22.

18 In the step four findings, the ALJ discussed in detail medical
19 evidence, including objective test results from treating and
20 examining physicians, and Plaintiff's testimony. Tr. 19-22. He
21 found Plaintiff's subjective complaints were not entirely credible.
22 21. At step five, the ALJ found Plaintiff's ability to perform all
23 ranges of exertional work was limited only by nonexertional
24 limitations that have "little or no effect on the occupational base
25 of unskilled work at all exertional levels." Tr. 23. Taking
26 judicial notice of a significant number of unskilled jobs in the
27 national economy, and relying on the Medical-Vocational Guidelines
28

1 (Grids) as a "framework," he concluded Plaintiff was not disabled as
2 defined by the Social Security Act. *Id.*

3 ISSUES

4 The question is whether the ALJ's decision is supported by
5 substantial evidence and free of legal error. Plaintiff argues the
6 ALJ erred when he: (1) used the Grids in lieu of VE testimony at
7 step five; (2) failed to address treating and examining physician
8 evidence; and (3) made improper credibility findings. ECF No. 12 at
9 8-14. Defendant argues the ALJ's decision is supported by
10 substantial evidence, without legal error and should be affirmed.
11 ECF No. 20.

12 DISCUSSION

13 A. Credibility

14 Plaintiff argues the ALJ failed to justify his adverse
15 credibility determination with legally sufficient reasons.
16 Specifically, Plaintiff contends the ALJ simply supplied boiler
17 plate language in his decision, ignoring Social Security Regulations
18 and the Commissioner's policy statements that require specific
19 findings to support rejection of subjective symptom complaints. ECF
20 No. 12 at 12-13; see also *Bunnell v. Sullivan*, 947 F.2d 341, 345-46
21 (9th Cir. 1991)(en banc)(ALJ must provide "specific, cogent reasons
22 for the disbelief" to reject a claimant's subjective complaints).
23 *Id.* The court has expanded the standard articulated in *Bunnell*
24 where there is no affirmative evidence of malingering. In these
25 cases, reasons for rejecting a claimant's subjective complaints must
26 be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th
27 Cir. 1995); see also *Taylor v. Commissioner of Social Sec. Admin.*,

1 659 F.3d 1228, 1234 (9th Cir. 2011); *Vasquez v. Astrue*, 572 F.3d 586,
2 591 (9th Cir. 2009); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th
3 Cir. 2007); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998);
4 *Swenson v. Sullivan*, 876 F.2d 683, 687 (9th Cir. 1989).

5 Here, the ALJ's credibility determination includes specific,
6 "clear and convincing" reasons that are supported by evidence
7 referenced in the ALJ's decision. Tr. 21-22. The ALJ discussed
8 Plaintiff's testimony, identified specific allegations he found not
9 entirely credible, and referenced specific evidence that supported
10 his credibility determination. For example, after making a general
11 statement that Plaintiff's allegations were not credible "to the
12 extent they are inconsistent" with the RFC determination, the ALJ
13 found "claimant's statements regarding the severity of his asthma
14 and chemical sensitivity and resulting limitations are not fully
15 credible." Tr. 21. This finding is sufficiently specific to allow
16 this court's review.

17 The ALJ then listed "clear and convincing" reasons for
18 discounting Plaintiff's statements. Specifically he found the
19 record includes (1) little medical evidence of treatment after
20 multiple evaluations; (2) medical reports showing "normal" results
21 from allergy testing and "minimal physical findings" on examination;
22 (3) treating physician clinic notes showing symptoms were "well-
23 controlled" with medication; (4) physician reports of "mild asthma";
24 (5) no evidence to show a worsening of Plaintiff's condition to the
25 degree alleged since the time of the cited assessments; (5) and
26 evidence of Plaintiff's inconsistent statements re: ability to drive
27 for four hours and attend medical evaluations in spite of a claimed
28

1 inability to tolerate exhaust fumes. Tr. 21-22. These are all
2 "clear and convincing" reasons to discount Plaintiff's extreme
3 symptom complaints and allegations of disabling chemical
4 sensitivity. *Molina v. Astrue*, 674 F.3d 1104, 1112-13 (9th Cir.
5 2012)(inability to tolerate "minimal human interaction" contradicted
6 by record); *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.
7 2008)(lack of treatment); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th
8 Cir. 2005) (objective medical findings one factor considered in
9 discrediting testimony); *Light v. Social Sec. Admin.*, 119 F.3d 789,
10 792 (9th Cir. 1997); *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
11 1996)(symptoms well-controlled by medication); *Fair v. Bowen*, 885
12 F.2d 597, 603-04 (9th Cir. 1989)(lack of treatment supports adverse
13 credibility finding). The ALJ did not err in his credibility
14 determination.

15 **B. Evaluation of Medical Source Opinions**

16 Plaintiff argues the ALJ improperly relied on medical opinions
17 from non-examining agency physician, Guillermo Rubio, M.D., as a
18 basis for rejecting uncontroverted medical evidence from his
19 treating physician, Richard Wilkinson, M.D., and allergy specialist
20 Gordon Baker, M.D. ECF No. 12 at 6-7, 10. Plaintiff also asserts
21 the ALJ failed to reject with "clear and convincing" reasons the
22 opinions of Drs. Wilkinson and Baker that Plaintiff's sensitivity to
23 identified chemicals significantly limits his ability to tolerate
24 the work environment. *Id.*

25 **Dr. Rubio**

26 In February 2008, agency physician Dr. Rubio assessed Plaintiff
27 physical RFC, based on results from a consultative examination
28

1 conducted by Dr. Opara on February 2, 2008. Dr. Opara, who also
2 reviewed progress notes from 2007 and interviewed Plaintiff,
3 concluded Plaintiff had no exertional limitations, and non-
4 exertional restrictions due to bronchial asthma and allergies that
5 Plaintiff reported were exacerbated by chemical fumes and
6 environmental irritants. Tr. 366-68. Results from pulmonary
7 function tests supporting Dr. Opara's findings are included in the
8 record. Tr. 374-78.

9 Based on Dr. Opara's report, Dr. Rubio concluded Plaintiff had
10 no exertional limitations but needed to "avoid concentrated exposure
11 to fumes, odors, dust, gases, poor ventilation, etc." Tr. 380-86.
12 Because Dr. Rubio's findings are supported by Dr. Opara's
13 examination findings and laboratory test results, they are
14 substantial evidence. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th
15 Cir. 1995); *Lester*, 81 F.3d at 830-31. Consistent with Dr. Opara's
16 findings, the ALJ found Plaintiff could not perform his past
17 relevant work. Tr. 23. Further, as discussed below, because the ALJ
18 properly rejected contradicting opinions from Plaintiff's treating
19 physician and allergy specialist, dated January 2010 and May 2010
20 respectively, the ALJ's reliance on Dr. Opara's and Dr. Rubio's
21 conclusions at step five is not legal error.

22 **Dr. Wilkinson**

23 The record indicates Dr. Wilkinson treated Plaintiff for asthma
24 and allergies on August 14, 2008, through June 2009. Clinic notes
25 indicate conservative treatment, including medication to control
26 symptoms, was recommended based on Plaintiff's self-reported
27 symptoms and results of hair analyses which showed high levels of
28

1 uranium. Tr. 396-419, 415. In January 2010, Dr. Wilkinson penned
2 a one paragraph letter with a list of specific irritants that
3 Plaintiff should avoid "to improve his health." Tr. 420-21. The
4 ALJ summarized this evidence and gave little weight to Dr.
5 Wilkinson's 2010 opinion that Plaintiff should avoid exposure to the
6 extensive list of items,¹ finding the opinion was unsupported by
7 objective testing, and "Dr. Wilkinson provided no further
8 explanation for his recommendation to avoid such items." Tr. 20,
9 21. He also noted Plaintiff's reported driving activities (and
10 exposure to vehicle exhaust) are inconsistent with Dr. Wilkinson's
11 opinion. These are legally sufficient reasons for rejecting a
12 treating physician's opinion.² *Thomas v. Barnhart*, 278 F.3d 947,

14
15 ¹ Dr. Wilkinson opined Plaintiff should "avoid" the following
16 items: "polishes, detergents, bleach, cleaning solutions, perfumes,
17 deodorants, dryer sheets, hairspray, shampoo, lotions, nail polish
18 and remover, diesel, gas, pesticides, herbicides, ink, Sharpie pens,
19 exhaust from vehicles, glue, PC printer, rug odors, and newly
20 printed newspaper." Tr. 421.

21 ² The list provided by Dr. Wilkinson is contradicted by Dr.
22 Baker's items and those identified by Dr. Rubio in his Physical RFC,
23 as well as medical evidence from other treating medical sources and
24 summarized by the ALJ. Tr. 19-20; see, e.g., Tr. 342, 343-44.
25 Therefore, to reject Dr. Wilkinson's medical opinion, the ALJ's
26 reasoning must be "specific" and "legitimate." *Lester*, 81 F.3d at
27 830-31. Further, as the Ninth Circuit has emphasized, the ALJ is
28 not required to recite specific words in rejecting medical opinions.

1 957 (9th Cir. 2002)(ALJ need not accept a treating source opinion
2 that is "brief, conclusory and inadequately supported by clinical
3 findings"). The ALJ did not err in the weight given Dr. Wilkinson's
4 opinions regarding substances Plaintiff should avoid.

5 **Dr. Baker**

6 Dr. Baker is not a treating physician. He evaluated Plaintiff
7 one time on May 14, 2010, several days before the ALJ hearing. Tr.
8 428-31. On examination, Dr. Baker observed normal lungs, airways,
9 skin, eyes and throat. After summarizing Plaintiff's medical
10 history, self-reported sensitivity to all chemical substances and
11 everyday odors, he noted that Plaintiff had driven four hours to get
12 to the evaluation and did not show distress in the office
13 environment. Tr. 429-31. Although Dr. Baker did not order allergy
14 tests, he agreed with Dr. Wilkinson's opinion that the listed
15 substances should be avoided. He specifically opined Plaintiff
16 "should avoid environments with solvents, inks, sprays and paints"
17 and was disabled because "it would be extremely difficult if not
18 impossible for him to find a workplace given his restrictions and
19 limitations." Tr. 20, 427, 431,

20 The ALJ summarized Dr. Baker's medical evidence, noting Dr.
21 Baker observed normal physical abilities and clear lungs, and
22 diagnosed chronic rhinitis, although no allergy testing was

23 _____
24 *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989.) From the
25 ALJ's summary, referenced medical records indicating symptoms are
26 well-controlled with medication, and no consistent treatment between
27 2004 and 2007, the court can draw inferences consistent with the
28 ALJ's rejection Dr. Wilkinson's list. *Id.*

1 performed. He reasonably rejected Dr. Baker's opinion that
2 Plaintiff is disabled because "such a finding is reserved to the
3 Commissioner," and because Dr. Baker's conclusions regarding
4 Plaintiff's intolerance to the listed substances is unsupported by
5 objective evidence and based only on Plaintiff's subjective
6 complaints. Tr. 21. These are specific and legitimate reasons for
7 rejecting an examining source opinion that is contradicted by other
8 medical opinions. 20 C.F.R. § 404.1527(d)(no special significance
9 given to medical source opinions on issues reserved to the
10 Commissioner); *Magallanes*, 881 F.2d at 752.

11 **C. Application of the Medical-Vocational Guidelines (Grids)**

12 Plaintiff contends the most egregious error made by the ALJ is
13 his failure to obtain vocational expert testimony at step five. He
14 argues his functional limitations are non-exertional; therefore use
15 the Grids to support a finding of "not disabled" is legal error
16 requiring remand. ECF No. 12 at 9-10.

17 The Grids were adopted by the Social Security Administration
18 (SSA) to improve the efficiency and uniformity of Social Security
19 benefits proceedings at step five, when the Commissioner is obliged
20 to prove there are other suitable jobs available. *Desrosiers v.*
21 *Secretary of Health and Human Serv's*, 846 F.2d 573, 577 (9th Cir.
22 1988). "Where a claimant's qualifications correspond to the job
23 requirements identified by the rule, the guidelines direct a
24 conclusion as to whether work exists that the claimant could
25 perform." *Heckler v. Campbell*, 461 U.S. 458, 461-62 (1983).
26 Generally, "[s]ignificant non-exertional impairments make reliance
27 on the Grids inappropriate." *Desrosiers*, 846 F.2d at 577. However,

1 where non-exertional limitations would not significantly erode an
2 occupational base, application of the Medical-Vocational Guidelines
3 is appropriate. *Desrosiers*, 846 F.2d at 577 ("non-exertional
4 limitations do not automatically preclude applications of the
5 grids"); *Razey v. Heckler*, 785 F.2d 1426, 1430 (9th Cir. 1986)(non-
6 exertional limitations did not require use of vocational expert);
7 SSR 83-10.

8 Here, the ALJ determined Plaintiff could perform a full range
9 of work "at all exertional levels"; transferability of his skills is
10 not an issue. Tr. 18, 22. These findings are not challenged. As
11 discussed above, the ALJ's RFC determination that Plaintiff's
12 impairments restrict him to a work environment where he can avoid
13 concentrated exposure to fumes, odors, gases and poor ventilation is
14 supported by credible evidence.

15 The Commissioner's administrative regulations address claims
16 such as this in which there are environmental restrictions, but no
17 restrictions on a exertional capacities.

18 Environmental restrictions ordinarily would not
19 significantly affect the range of work existing in the
20 national economy for individuals with the physical
21 capacity for heavy work (or very heavy work). Thus an
22 impairment which does not preclude heavy work [or lesser
23 exertional functional capacity] . . . would not ordinarily
be the primary reason for unemployment, and generally is
sufficient for a finding of not disabled, even though age,
education, and skill level of prior work experience may be
considered adverse.

24 20 C.F.R. Part 404, Subpart P, Appendix. 2 § 204.00; see also SSR
25 85- 15("where a person has a medical restriction to avoid excessive
26 amounts of noise, dust, etc., the impact on the broad world of work
27 would be minimal"). The ALJ's reliance on this administrative
28

1 guideline is proper and justified. The final RFC determination is
2 supported by credible evidence in the entire record. The ALJ was
3 not obliged to call a vocational expert and by applying the Grids,
4 met his step five burden. *See Heckler*, 461 U.S. at 467 (agency's
5 reliance on administrative guidelines upheld; vocational expert
6 testimony not required in every case). Accordingly,

7 **IT IS ORDERED:**

8 1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is
9 **DENIED.**

10 2. Defendant's Motion for Summary Judgment, **ECF No. 19**, is
11 **GRANTED.**

12 3. An application for attorney fees may be filed by separate
13 motion.

14 The District Court Executive is directed to file this Order and
15 provide a copy to counsel for Plaintiff and Defendant. Judgment
16 shall be entered for Defendant, and the file shall be **CLOSED.**

17 DATED June 18, 2013.

18
19 S/ CYNTHIA IMBROGNO
20 UNITED STATES MAGISTRATE JUDGE
21
22
23
24
25
26
27
28